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# From “Arbitrary” to Arbitration: Using ADR’s Popular Favorite to Resolve Commercial Marijuana Disputes

Madeline G. Landry\*

## INTRODUCTION

Arizona entrepreneurs Michele Hammer and Mike Haile thought they were making a smart business decision in August 2010 when they each loaned \$250,000 to Today’s Health Care II (“THC”), a Colorado-based medical marijuana dispensary.<sup>1</sup> After all, Colorado’s medical marijuana industry was second only to California’s at the time, and California’s medical marijuana industry was estimated at \$1.3 billion dollars.<sup>2</sup> Both loan agreements specifically provided that THC would “use the loan proceeds for a retail medical marijuana sales and growth center.”<sup>3</sup> When THC defaulted on its loan obligations, the two lenders brought suit in Maricopa County, Arizona Superior Court to enforce their agreement.<sup>4</sup> Judge Michael McVey instead dismissed the case, stating that he couldn’t enforce the agreement where “[t]he explicitly stated purpose of these loan agreements was to finance the sale and distribution of marijuana. This was in clear violation of the laws of the United States. As such, th[e] contract [was] void and unenforceable.”<sup>5</sup>

The “harsh result”<sup>6</sup> of McVey’s ruling sent a worrisome message to individuals in the marijuana industry: So long as the current treatment of

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1. Abellin, *\$500,000 Medical Marijuana Loan Up In Smoke*, ABC NEWS (May 12, 2012), <http://abcnews.go.com/Business/500000-medical-marijuana-lawsuit-smoke/story?id=16322793> [http://perma.cc/4PER-ZED3].

2. *Id.*

3. Hammer v. Today’s Health Care II, No. CV2011-051310, 2012 WL 12874349, \*1 (Ariz. Sup. Ct. Apr. 12, 2012).

4. Abellin, *supra* note 1; see also Yvonne Wingett Sanchez, *Arizona Medical-Pot Ruling May Reverberate*, ARIZONA REPUBLIC (May 9, 2012, 10:06 PM), <http://www.pressreader.com/usa/the-arizona-republic/20120510/281741266445069> [http://perma.cc/JCU7-VEU6].

5. Hammer, 2012 WL 12874349, at \*4.

6. *Ibid.*

marijuana under the Federal Controlled Substances Act<sup>7</sup> remains in effect, marijuana dispensaries and those who do business with them will be denied access to the courts for relief when a deal goes south—state law notwithstanding.<sup>8</sup> To remedy this lawless situation, at least while legislators sort out the federalism issues, the commercial marijuana industry should turn to private arbitration for protection.

Hammer and Haile, unfortunately, are not alone. Similar court rulings have threatened the undoing of state-level marijuana initiatives.<sup>9</sup> Yet public support for legalization has risen dramatically over the past several decades.<sup>10</sup> According to a survey performed by Pew Research Center, fifty-three percent of Americans supported some form of legalization in 2015.<sup>11</sup> When Pew performed the same survey a little over three decades earlier, only twenty-five percent of Americans supported legalization.<sup>12</sup> To meet the growing demand, an increasing number of states have enacted legislation permitting medical or recreational marijuana use.<sup>13</sup>

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7. 21 U.S.C. §§ 812, 841–65 (2017). Congress enacted the Federal Controlled Substances Act (CSA) pursuant to the Nixon Administration's declared national "war on drugs." See *Gonzales v. Raich*, 545 U.S. 1, 10 (2005). The CSA purports to combat drug abuse, prevent the diversion of drugs into illicit channels, and eliminate "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances." 21 U.S.C. § 801(1)–(6). To these ends, "Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Raich*, 545 U.S. at 13.

8. U.S. Const. art. VI, cl. 2, provides, in pertinent part, that "[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This Clause mandates that state action give way to federal legislation where a state law conflicts with a valid act of Congress. See *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824); see also *Pearson v. McCaffrey*, 139 F.Supp.2d 113, 121 (D.D.C. 2001) ("Even though state law may allow for the prescription or recommendation of medicinal marijuana within its borders, to do so is still a violation of federal law under the CSA.").

9. See *United States v. Scarmazzo*, 554 F. Supp. 2d 1102, 1105 (E.D. Cal. 2008) ("The use of medical marijuana remains unlawful."); *Tracy v. USAA Cas. Ins. Co.*, No. 11-00487LEK-KSC, 2012 WL 928186, at \*13 (D. Haw. Mar. 16, 2012) (holding that, on summary judgment motion, Court could not enforce "Trees, Shrubs, and Other Plants" provision of insurance policy because plaintiff's possession and cultivation of marijuana clearly violated federal law); see also *Barrios v. County of Tulare*, No. 1:13-CV-01665 AWI GSA, 2014 WL 2174746, at \*5 (E.D. Cal. May 23, 2014) (holding that plaintiff could not recover damages as a result of the confiscation or destruction of marijuana because plaintiff had no cognizable property interest in the marijuana); *Haeberle v. Lowden*, No. 2011-CV-709, 2012 WL 7149098 (Colo. Dist. Ct. Aug. 8, 2012).

10. See Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx> [https://perma.cc/J89P-H7KJ] (explaining the growing trend for public support of marijuana usage between 1970 and 2013); see also *Majority of Americans Support Legalization of Marijuana — Polls*, RT (Apr. 15, 2015, 4:10 PM), <http://www.rt.com/usa/249765-majority-americans-marijuana-legalization> [https://perma.cc/VYQ7-WHMK].

11. *Majority of Americans Support Legalization of Marijuana*, *supra* note 10.

12. *Id.*

13. In November 2012, Colorado and Washington became the first states to legalize marijuana for

Officially, however, marijuana’s legal status is the same as it has been since 1970 — categorically forbidden and subject to criminal penalties.<sup>14</sup> Marijuana is a Schedule I controlled substance under federal law; its manufacture, distribution, possession, and cultivation are strictly prohibited pursuant to the Federal Controlled Substances Act.<sup>15</sup>

The federal government has repeatedly denied attempts to reschedule marijuana from a Schedule I to a Schedule II drug.<sup>16</sup> In 2011, Deputy Attorney General James M. Cole issued a memorandum to U.S. attorneys stating that “[p]ersons who are in the business of cultivating, selling, or distributing marijuana . . . are in violation of the [CSA], regardless of state law.”<sup>17</sup> Two years later, Cole issued a subsequent memorandum signaling a general shift in drug enforcement tactics toward more selective prosecution.<sup>18</sup> The memo listed eight broadly stated enforcement

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recreational use. COLO. CONST. art. XVIII, *amended by* COLO. CONST. amend. LXIV, § 16; Washington Marijuana Legalization and Regulation, Initiative 502, ch. 3, 2013 Wash. Legis. Serv. 28 (West) (Initiative Measure-Marijuana-Legalization and Regulation); *see also* Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legalization Questions Remain*, N.Y. TIMES: POLITICS (Nov. 7, 2012), <https://mobile.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html> [<https://perma.cc/U24T-4CWH>]. Both states now treat marijuana similarly to alcohol — subject to taxes and heavy regulation, but nonetheless legal for adult use — and other states are beginning to follow their example. COLO. CONST. amend. LXIV; Washington Marijuana Legalization and Regulation, Initiative 502. In 2014, voters approved similar initiatives to legalize marijuana in Washington, D.C., Oregon, and Alaska. Josh Barro, *D.C., Oregon and Alaska Vote to Legalize Marijuana*, N.Y. TIMES: THE UPSHOT (Nov. 3, 2014), <http://www.nytimes.com/2014/11/04/upshot/marijuana-on-the-ballot-in-florida-alaska-oregon-and-dc.html> [<https://perma.cc/E7NY-FSGS>]. The District of Columbia and Oregon have since enacted similar legislation. *See State Marijuana Laws Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreation.html> [<https://perma.cc/PEG9-22ME>]. To date, twenty-seven states and the District of Columbia have legalized marijuana for either or both medical or recreational purposes. These states are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *See* Ben Gilbert, *One in 5 Americans will soon have access to fully legal marijuana*, BUSINESS INSIDER: LAW & ORDER (Nov. 14, 2016, 12:01 PM), <http://www.businessinsider.com/marijuana-in-america-20-of-americans-can-now-access-legal-weed-2016-11> [<https://perma.cc/BXJ2-7FJR>], for map of marijuana policy in the United States; *see generally* Marijuana Policy Project, *Map of State Marijuana Laws*, <https://www.mpp.org/states/> [<https://perma.cc/QTC4-CDDA>].

14. 21 U.S.C. §§ 801, 812, 841–65 (2012).

15. Congress identifies Schedule I drugs as those with (1) “a high potential for abuse,” (2) “no currently accepted medical use in treatment in the United States,” and (3) “a lack of accepted safety for use of the drug or other substance under medical supervision.” 21 U.S.C. § 812(b)(1).

16. *See* Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (1997) (setting forth George W. Bush’s stance of strong federal opposition to all marijuana use, including uses permitted under state law).

17. Memorandum from James M. Cole, Deputy Att’y Gen., on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, at 2 (June 29, 2011), <https://www.scribd.com/document/68589215/Cole-Memo-June-2011> [<https://perma.cc/A77S-4VCK>].

18. Memorandum from James M. Cole, Deputy Att’y Gen., on Guidance Regarding Marijuana

priorities.<sup>19</sup> Outside the listed priorities, the memo expressed a strong deference to state law.<sup>20</sup> That same year, President Obama promised not to use “Justice Department resources to try to circumvent state laws on th[e] issue.”<sup>21</sup> The President, however, neither purported to reinterpret the CSA nor ruled out federal enforcement in those states that permit or even abet illegal activities.

Judicial refusal to convert such executive statements into binding law leaves individuals like Michele Hammer and Mike Haile at the mercy of those with whom they do business. For Hammer and Haile, that meant \$500,000 out of pocket. For medical directors of dispensaries, it may mean nonpayment for services. For landlords leasing to dispensaries, it may mean fewer options in situations of default. For investors in dispensaries, it may mean more losses than profits. Unless and until Congress reschedules marijuana, where state marijuana laws come into conflict with the CSA, the state laws will be preempted and overruled by federal law.<sup>22</sup> Attorneys representing individuals like Hammer and Haile have not overlooked this opportunity. Marijuana law blogs frequently feature practitioner posts exploring possible solutions for the conflict.<sup>23</sup> The blogs themselves, however, attest to the fact that no one solution sought within the existing framework adequately controls for the varying results of different courts and different forums.<sup>24</sup> This Note proposes that individuals involved in, or seeking involvement in, the marijuana industry circumnavigate this

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Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/9B7M-HGYR>] [hereinafter Cole Memo 2013].

19. *Id.* These include: Preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property.

Cole Memo 2013, *supra* note 18, at 1–2.

20. *Id.* at 2.

21. The Editorial Board, *American Mayors: Let Them Smoke Pot*, N.Y. TIMES: THE OPINION PAGES (June 28, 2013), [http://www.nytimes.com/2013/06/29/opinion/american-mayors-let-them-smoke-pot.html?\\_r=0](http://www.nytimes.com/2013/06/29/opinion/american-mayors-let-them-smoke-pot.html?_r=0) [<https://perma.cc/R7XP-STJM>]; see Cole Memo 2013, *supra* note 18, at 2 (making clear that the U.S. Department of Justice (“DOJ”) would no longer use valued resources to patrol state marijuana dealings).

22. See Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 102–03 (2015).

23. See, e.g., Rebecca Millican, *Your Cannabis Contract: Is It Worth the Paper It’s Written On?*, CANNA L. GRP. (Sept. 13, 2015), <http://www.cannalawblog.com/your-cannabis-contract-is-it-worth-the-paper-its-written-on> [<https://perma.cc/5Y2K-QRN4>].

24. Millican, *supra* note 23. Millican’s own blog corroborates this point.

impasse between the federal and state governments by submitting to arbitration any dispute arising out of or related to marijuana.

## I. WHY ARBITRATION? BACKGROUND AND CONTEXT

Arbitration<sup>25</sup> is popularly touted as the most efficient, inexpensive, and definitive method of dispute resolution in the United States.<sup>26</sup> The method has become so prominent<sup>27</sup> some critics even contend arbitration is "the new litigation," increasingly resembling a parallel judicial system.<sup>28</sup> Shortcomings of this system have led to a rise in different forms of alternative dispute resolution ("ADR"),<sup>29</sup> although consensual arbitration remains a favorite among alternatives. In 2011, the United States Supreme Court, no less, praised the arbitration process for "allow[ing] efficient, streamlined procedures tailored to the type of dispute."<sup>30</sup> The Court exalted, "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."<sup>31</sup> Arbitration,

25. Leading arbitration scholar Thomas Stipanowich remarks that "[a]rbitration is often described as everything that civil litigation is not." Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 429 (1988). The American Arbitration Association (AAA) defines arbitration as "... the submission of a dispute to one or more impartial persons for a final and binding decision, known as an 'award.'" *Using ADR to Resolve Collegiate, Professional, and Sports-Business Disputes*, AMERICAN ARBITRATION ASSOCIATION, [https://www.adr.org/sites/default/files/document\\_repository/Using%20ADR%20to%20Resolve%20Collegiate%20Professional%20and%20Sport%20Business%20Disputes.pdf](https://www.adr.org/sites/default/files/document_repository/Using%20ADR%20to%20Resolve%20Collegiate%20Professional%20and%20Sport%20Business%20Disputes.pdf) [https://perma.cc/AP9F-VYD4]. "Arbitration is the most traditional form of private dispute resolution. . . . Arbitration is adjudicatory, as opposed to advisory, because of the fact that the arbitrator (usually a retired judge or attorney) renders a decision at the end of an arbitration hearing, and that decision is final and binding, subject only to a very limited court review." *Arbitration Defined*, JAMS, <https://www.jamsadr.com/arbitration-defined/> [https://perma.cc/FR2P-45N3].

26. See David B. Lipsky & Ronald L. Seeber, *THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS* (1998), <http://digit.alcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1003&context=icrpubs> (detailing reasons why companies use arbitration); AMERICAN ARBITRATION ASSOCIATION, *supra* note 25 (defining arbitration as a "time-tested, cost-effective alternative to litigation"); LONDON COURT OF ARBITRATION, [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx) [https://perma.cc/6UUS-K5D4] (ranking the best features of arbitration as including "maximum flexibility for parties . . . ; speed and efficiency . . . ; means of reducing delays and counteracting delaying tactics").

27. For example, AT&T acknowledged in a petition for a writ of certiorari that its arbitration clauses were embedded in "tens (if not hundreds) of millions" of wireless service agreements. Reply Brief for the Petitioner at 1, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (No. 09-893) (U.S. May 3, 2010).

28. Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 8-9 (2010). Stipanowich drives his point home by defining arbitration as a "wide-ranging surrogate for civil trial." *Id.* at 5.

29. See Peter B. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134, 135-36 (1984); see generally James F. Henry, *Alternative Dispute Resolution: Meeting the Legal Needs of the 1980s*, 1 OHIO ST. J. DISP. RESOL. 113 (1985).

30. *AT&T Mobility LLC*, 563 U.S. at 344-45.

31. *Id.* at 345; 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009) (internal quotations

however, is hardly revolutionary. Aggrieved parties turned to arbitration centuries ago to resolve their disputes.<sup>32</sup>

The modern era of arbitration began in the 1920s with the passage of a New York state statute requiring the enforcement of contractual agreements to arbitrate future disputes.<sup>33</sup> Acts of similar import were before a number of state legislatures when Congress passed federal legislation, modeled after the New York Act,<sup>34</sup> “to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.”<sup>35</sup>

Enacted in 1925, the Federal Arbitration Act addresses centuries of judicial hostility to arbitration<sup>36</sup> by placing arbitration agreements “upon the same footing as other contracts.”<sup>37</sup> The origins of this “common law hostility toward arbitration”<sup>38</sup> apparently lie in “ancient times” when the English courts fought “for extension of jurisdiction — all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.”<sup>39</sup> American courts initially followed English practice, perhaps just “stand[ing] . . . upon the antiquity of the rule” prohibiting arbitration clause enforcement, rather than “upon its excellence or

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omitted).

32. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926) (“[Arbitration] deals neither with a novel nor a radical remedy, but with one founded upon the experience of centuries.”); Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 144 (2002) (“The use of arbitration began in the United States during the colonial period.”); Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861, 865 (2004) (stating that arbitration has been used in the United States “almost from the nation’s founding”).

33. Cohen, *supra* note 32, at 266. For a review of the New York statute, see *Berkovitz v. Arbib & Houlberg*, 230 N.Y. 261 (1921).

34. Cohen, *supra* note 32, at 266.

35. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985); Cohen, *supra* note 32, at 265 (“By this Act there is reversed the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable”); *Volt Info. Sci. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989) (stating that the “principal purpose” of the FAA is to “ensur[e] that private arbitration agreements are enforced according to their terms”).

36. *See Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874) (stating a party “may submit his . . . suit . . . to an arbitration . . . . [However,] agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void”); *see also* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 137 (2002) (commenting that American courts viewed arbitration as threatening their power).

37. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoting H. R. REP. NO. 96, 68th Cong., 1st Sess., 2 (1924)).

38. *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984).

39. *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 211 n. 5 (1956) (Frankfurter, J., concurring) (quoting *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915)).

reason.”<sup>40</sup> The Federal Arbitration Act (“FAA”)<sup>41</sup> aims to change this anti-arbitration rule<sup>42</sup> and “to assure those who desire[] arbitration . . . that their expectations w[ill] not be undermined by federal judges, . . . by state courts[,] or [by] legislatures.”<sup>43</sup>

The key statutory provisions embodying this congressional pursuit include Section 2,<sup>44</sup> which declares that a written provision for arbitration “in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract;”<sup>45</sup> Section 3, requiring courts to stay litigation “upon any issue referable to arbitration under an agreement in writing for such arbitration;”<sup>46</sup> and Section 4, which provides a remedy for a party “aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration.”<sup>47</sup> It does so by directing courts to compel arbitration “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.”<sup>48</sup> Other relevant sections include Section 9, which details the procedures by which a prevailing party may seek to enforce an arbitral award,<sup>49</sup> and Section 10, which prescribes the procedures by which the nonprevailing party may seek to vacate an arbitral award.<sup>50</sup> These provisions together reflect a broad “national policy favoring arbitration.”<sup>51</sup>

Nevertheless, the U.S. judiciary only fully embraced arbitration in the 1980s after subjecting the Act to decades of searching review. Indeed, early United States Supreme Court decisions evince a high degree of

40. *Id.*

41. The FAA was originally named the United States Arbitration Act, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 2 (2006)). For further information on the history of the FAA, see Haydock, *infra* note 32, at 148 n.35.

42. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218–22 (1985).

43. *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d. Cir. 1961) (Lumbard, J., concurring); see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (the Act was designed “to make arbitration agreements as enforceable as other contracts, but not more so”).

44. References to sections, unless otherwise indicated, are to the FAA. Section 2 is considered the “primary substantive provision of the Act.” *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

45. 9 U.S.C. § 2.

46. 9 U.S.C. § 3.

47. 9 U.S.C. § 4.

48. *Id.*

49. 9 U.S.C. § 9.

50. 9 U.S.C. § 10(a)(1)–(4).

51. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that the FAA preempts state laws which “require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration”).



skepticism about the ability of arbitration to adequately enforce a party's legal rights.<sup>52</sup>

In the 1960s and 1970s, however, courts began to reconsider arbitration as judges called for "a reappraisal of the values of the arbitration process."<sup>53</sup> In *Metro Industrial Painting Corp. v. Terminal Constr. Co.*, for example, the United States Court of Appeals for the Second Circuit defeated a party's attempt to avoid the FAA by applying the federal framework, rather than local law, to an issue of arbitrability.<sup>54</sup> The court there based its decision on Section 2 of the FAA, stating that the Act created "a rule of substantive law declaring . . . that federal rather than local law governs 'questions of interpretation and construction as well as questions of validity, revocability[,] and enforceability of arbitration agreements . . . .'"<sup>55</sup> Accordingly, the court upheld the trial court's order compelling the parties to submit their dispute to arbitration.<sup>56</sup>

Similar decisions signaled a shift in federal judicial sanction for those "engaged in interstate transactions [seeking] an expeditious extra-judicial process for settling disputes."<sup>57</sup> The Supreme Court validated this choice for companies in its seminal 1967 *Prima Paint* decision.<sup>58</sup> Taking into

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52. See, e.g., *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 (1956) ("Arbitration carries no right to trial by jury . . . . Arbitrators do not have the benefit of judicial instruction on the law [and] need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial"); see also *Wilko v. Swan*, 346 U.S. 427, 435-36 (1953).

53. Warren E. Burger, Keynote Address, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 79, 94 (1976) (addressing the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice ("The Pound Conference") and recommending greater use of "the well-developed forms of arbitration" to settle disputes and remarking that "there is nothing incompatible between efficiency and justice." *Id.* at 92.).

54. *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 384 (2d Cir. 1961). The *Metro* case involved a painting subcontract for a housing project in Florida. *Id.* at 383. The subcontract contained the arbitration clause at issue. *Ibid.* Following performance of the subcontract, petitioners sought to compel arbitration in order to recover expenses incurred for work additional to that required by the contract. *Id.* at 384. Respondents refused to arbitrate the claims, and petitioners thereupon moved for relief under Section 4 of the FAA. *Ibid.*

55. *Metro*, 287 F.2d at 385 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 409 (1959), *cert. granted*, 362 U.S. 909, *cert. dismissed pursuant to stipulation*, 364 U.S. 801 (1960)).

56. *Metro*, 287 F.2d at 385.

57. *Id.* at 387 (Lumbard, J., concurring).

58. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967) (holding that, as a matter of federal substantive law, a challenge to the validity of an underlying contract is severable from a challenge to the validity of an embedded arbitration clause). The contract at issue in *Prima Paint*, much as in *Metro*, contained an arbitration clause requiring the parties to submit any dispute "arising out of or relating" to their agreement to settlement by arbitration. *Prima Paint*, 388 U.S. at 398. A party to the case alleged that the other had committed fraud in the inducement of the contract, although not of the arbitration clause in particular, and sought to have the claim of fraud adjudicated in federal court. *Id.* at 398-99.

consideration the legislative history of the Act, the Court there confirmed that the FAA "is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"<sup>59</sup> Thus, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, "is for the arbitrators and not for the courts" to decide.<sup>60</sup> The Court determined that such separability is necessary to ensure that "when selected by the parties to a contract, [the arbitration procedure] be speedy and not subject to delay and obstruction in the courts."<sup>61</sup>

Shortly thereafter, the Supreme Court issued multiple decisions expanding the rubric of the FAA. In the 1983 decision *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court emphasized that the FAA is a "congressional declaration of a liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," and that "as a matter of federal law, *any* doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."<sup>62</sup> A year later in *Southland Corp. v. Keating*, the Court reiterated that the FAA is applicable in both state and federal courts.<sup>63</sup> Further still, the Court there held that the FAA preempts state law — state courts cannot apply state statutes that invalidate arbitration agreements.<sup>64</sup> "[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."<sup>65</sup> In the years since *Southland*, the Court has consistently limited the application of challenges under the FAA,<sup>66</sup> offering dramatic

59. *Prima Paint*, 388 U.S. at 403 (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). In support of this conclusion, the Court wrote: "Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate." *Id.* at 405.

60. *Id.* at 400.

61. *Id.* at 404.

62. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (emphasis added); *Metro*, 287 F.2d at 384 ("Irrespective of state court decisions regarding the construction of arbitration clauses, all such clauses in contracts coming within the scope of the act must be interpreted in the light of federal decisional law.").

63. *Southland Corp. v. Keating*, 465 U.S. 1, 12, 15–16 (1984); *see, e.g., Perry v. Thomas*, 482 U.S. 483, 490 (1987) (finding preempted a state statute which rendered unenforceable private agreements to arbitrate certain wage collection claims).

64. *Southland*, 465 U.S. at 15–16.

65. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (*per curiam*) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011)).

66. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626–27 (1985) (reversing a First Circuit holding that some public policy issues are so critical that they must be left in the hands of the courts; ordering that the dispute under review be sent to arbitration; and noting that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution"); *Rent-A-Center, West v. Jackson*, 561 U.S. 63, 71–72 (2010) (holding that an arbitrator

affirmations of its contemporary faith in arbitration as an effective substitute for litigation.

## II. BUCKEYE: AN ILLEGAL AGREEMENT IS STILL A BINDING AND ENFORCEABLE AGREEMENT

Particularly significant to the enforcement of arbitration agreements in the marijuana-industry context, the Court in *Buckeye Check Cashing, Inc. v. Cardegna* held that an arbitration award is valid and enforceable even where the underlying factual circumstances of the dispute involve illegal activity.<sup>67</sup> In *Buckeye*, the Court considered whether the rule of severability adopted in *Prima Paint* should apply to a contract that might be intrinsically invalid — due, for example, to illegality.<sup>68</sup> The *Buckeye* respondents challenged a “Deferred Deposit and Disclosure Agreement” that allegedly provided for “usurious interest rates” in violation of Florida lending and consumer-protection laws.<sup>69</sup> Respondents argued that these violations rendered the agreement criminal on its face.<sup>70</sup> The petitioner moved to compel arbitration based on a clause within the agreement requiring Respondents to resolve “[a]ny claim, dispute, or controversy . . . arising from or relating to this Agreement . . . by binding arbitration.”<sup>71</sup> The trial court denied the motion, holding that a court rather than an arbitrator should resolve the respondents’ claim that the agreement was illegal and, therefore, void.<sup>72</sup> The appellate court reversed, but the Florida Supreme Court reversed the appellate decision in turn.<sup>73</sup> Florida’s high court reasoned that enforcing arbitration provisions contained in an allegedly unlawful contract “could breathe life into a contract that not only violates state law, but also is criminal in nature.”<sup>74</sup> “Florida public policy and contract law,” the Florida high court concluded, permit “no severable, or salvageable, parts of a contract found illegal and void under Florida law.”<sup>75</sup>

The United States Supreme Court granted certiorari in *Buckeye* and

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may decide a claim that an arbitration agreement is unconscionable); *AT&T Mobility*, 563 U.S. at 343, 352 (holding that the FAA’s preemptive effect extended even to grounds traditionally thought to exist “at law or in equity for the revocation of any contract,” rendering invalid California’s *Discover Bank* rule).

67. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006).

68. *Id.* at 444–45.

69. *Id.* at 443.

70. *Ibid.*

71. *Id.* at 442 (quoting the FAA).

72. *Id.* at 442.

73. *Ibid.*

74. *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 862 (2005).

75. *Id.* at 864.

reversed the Florida decision, reaffirming its *Southland* and *Prima Paint* holdings.<sup>76</sup> Heeding *Prima Paint*’s rule of severability,<sup>77</sup> the Court rejected the Florida court’s attempt to draw a distinction between void and voidable contracts.<sup>78</sup> The Court recognized that *Prima Paint* did not discuss whether the challenge at issue would have rendered the contract in that case void or voidable.<sup>79</sup> Indeed, *Prima Paint* expressly disclaimed any need to apply state severability rules to arbitration agreements.<sup>80</sup> Likewise in *Southland*, the Court did not dwell on whether the several challenges involved there — “fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of the California Franchise Investment law” — would have rendered the contract void or voidable.<sup>81</sup>

Instead of drawing a distinction between void and voidable contracts, the Court divided challenges to the validity of arbitration agreements into two types.<sup>82</sup> The first type, the Court explained, specifically challenges the validity of an agreement to arbitrate.<sup>83</sup> The other type of challenge the Court proffered brings into question the contract as a whole, either on some ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced) or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.<sup>84</sup> The first type of challenge prompts a *Southland* analysis; the second type of challenge, a *Prima Paint* analysis. Applying those analyses to the case at bar, the Court determined that a challenge to the validity of a contract as a whole, and not specifically to an arbitration clause, must go to the arbitrator.<sup>85</sup>

As applied to a dispute arising out of or relating to a commercial marijuana transaction, *Buckeye* provides support for a party to compel arbitration even where a challenge exists to the validity of the overall agreement under the CSA. This means that the illegality of part of the transaction — that part relating to marijuana — does not operate to nullify an agreement to arbitrate. In this context, *Buckeye* ensures that, once parties enter into an agreement containing arbitration provisions, disputes falling within the scope of parties’ agreement be determined by an arbitrator rather than a court; this contractual intent must be respected even

76. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006).

77. *Id.* at 449.

78. *Id.* at 446 (commenting on the fact that neither *Prima Paint* nor *Southland* turned on whether the challenge at issue would render the contract voidable or void).

79. *Ibid.*

80. *Ibid.*

81. *Ibid.*

82. *Id.* at 444.

83. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 4–5 (1984).

84. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006).

85. *Southland*, 465 U.S. at 4–5.

with regard to claims arising under the CSA.

### III. ENFORCEMENT: THE FULL FAITH AND CREDIT CLAUSE

*Buckeye* and the favorable Supreme Court jurisprudence it relied on ensure that all courts adhere to a correct interpretation of the FAA and that marijuana-industry participants have legal recourse. These measures would be futile if courts could refuse to confirm and enforce an award. Fortunately, the FAA precludes states from undermining its objectives by supplying mechanisms for the enforcement of arbitration awards: Parties may seek out a judicial decree confirming an award, an order vacating an award, or an order modifying or correcting an award.<sup>86</sup> For example, Section 9 of the FAA provides that “any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11.”<sup>87</sup> Even where the parties fail to specify a confirming court, “such application may be made to the United States court in and for the district within which such award was made.”<sup>88</sup> An application for any of these orders is an action in itself. The application obviates the usual need for a separate contract action to enforce or alter an arbitral award in court.<sup>89</sup>

The Supreme Court’s consistent treatment of the Full Faith and Credit Clause<sup>90</sup> demands that state courts afford a judgment obtained pursuant to these provisions the same *res judicata* effect that it would receive had a court, rather than an arbitrator, issued the judgment.<sup>91</sup> Over 225 years ago, by the Act of 26th May, 1790, Ch. 11, Congress affirmed the constitutional guaranty embodied in the full faith and credit clause, providing that “the judgment of a state court should have the same credit, validity and effect, in

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86. 9 U.S.C. §§ 9–11.

87. 9 U.S.C. § 9.

88. *See id.*

89. 9 U.S.C. § 6.

90. U.S. Const. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

91. According to the Court, the purpose of the clause was to replace the international rule of comity with a constitutional duty of states to honor the laws and judgments of sister states. *Estin v. Estin*, 334 U.S. 541, 546 (1948) (noting that the full faith and credit clause “substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns”); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (noting that “the clear purpose of the full faith and credit clause” was to establish the principal that “a litigation once pursued to judgment shall be as conclusive as the rights of the parties in every court as in that where the judgment was rendered”).

every other court of the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded [*sic*] in any other court in the United States.”<sup>92</sup> As the Court later put it, the effect of this Act brought a useful end to state-to-state litigation by making “the local doctrines of *res judicata* . . . a part of the national jurisprudence.”<sup>93</sup> Thus, as early as 1813, the Court interpreted the Act, for example, as requiring a court in the District of Columbia to enforce a judgment rendered in New York.<sup>94</sup> The next century was no different — in 1908, a Mississippi court was compelled to enforce a judgment rendered in Missouri, even though the Missouri judgment was allegedly based on a misapprehension of Mississippi law.<sup>95</sup> Recent decisions of the Court maintain that the clause imposes a duty on state courts to give another state court’s judgment the same effect that the issuing court would give it.<sup>96</sup> Judgments of one court thereby gain “nationwide force” for “claim and issue preclusion (*res judicata*) purposes.”<sup>97</sup>

In the context of the marijuana industry, once an arbitration award is given the force of a state court judgment, it gains nationwide force — no matter allegations of the underlying agreement’s purported illegalities.

The cumulative effect of this long legal history should offer members of the marijuana industry a realistic possibility of legal security and equity. No more may a party to a contract for marijuana fail to perform under that contract and escape the consequences. Insofar as the contract incorporates some agreement to arbitrate, a party may be forced to perform on a contract to which the party agreed and received a benefit, even where the disputed contract violates federal law. An arbitrator, unlike a judge in a court of law or equity, will enforce, revoke, or rescind a contract for marijuana as the law so requires — no matter marijuana’s status under the CSA.

92. *Hampton v. M’Connel*, 16 U.S. 234, 235 (1818) (Marshall, J.).

93. *Durfee v. Duke*, 375 U.S. 106, 109 (1963).

94. *See Mills v. Duryee*, 11 U.S. 481, 484 (1813) (“[T]he constitution contemplated a power in congress to give a conclusive effect to such judgments.”).

95. *See Fauntleroy v. Lum*, 210 U.S. 230, 237–38 (1908).

96. *V.L. v. E.L.* 136 S. Ct. 1017, 1020 (2016) (“[The Full Faith and Credit] Clause requires each State to recognize and give effect to valid judgments rendered by the courts of its sister States.”); *Thompson v. Thompson*, 484 U.S. 174, 180 (1988) (“[T]he Full Faith and Credit Clause obliges States only to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered.”); *see also Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525 (1986).

97. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

#### IV. PROPOSAL: A MODEL ARBITRATION AGREEMENT FOR THE MARIJUANA INDUSTRY

Under the terms of the FAA and the foregoing Supreme Court jurisprudence, a party may submit any dispute to arbitration that arises out of or relates to a commercial-marijuana transaction without fear of the risks associated with contravening the CSA.<sup>98</sup> Beyond the FAA and Supreme Court jurisprudence, policies propounded by the leading ADR organization, the American Arbitration Association (AAA), support a party's ability to choose an industry-specific arbitrator, the site of the arbitration, and the law to govern the dispute.<sup>99</sup> Such choices further reduce the uncertainty involved in litigating the same dispute under state law. Through careful drafting of arbitration terms, then, the marijuana industry and all involved can find the freedom to seek out fair and equitable redress *within* the law.

To illustrate, I suggest, with commentary, the following Model Arbitration Agreement for the Marijuana Industry:

*Any dispute, claim or controversy arising out of or relating to this agreement or the breach, termination, enforcement, interpretation, legality, issues of public policy or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined exclusively by arbitration in [forum State].*

Commentary to provision (1):

This provision implements the guarantee of validity provided by Section 2 of the FAA.<sup>100</sup> This language has been tested by the courts and held to comport with the liberal policy in favor of arbitration embodied in the FAA.<sup>101</sup> Further, the holdings in *Prima Paint*, *Southland*, and *Buckeye*, instruct that arbitrability goes before an arbitrator first.<sup>102</sup> As such, commercial-marijuana contracts containing a similar provision should be

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98. See *supra* Parts I, II & III.

99. See, e.g., *Commercial Arbitration Rules and Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION, [adr.org/commercial](https://perma.cc/S438-45R8) [https://perma.cc/S438-45R8].

100. 9 U.S.C. § 2.

101. See *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 385 (2d. Cir. 1961) ("The federal policy [is] to construe liberally arbitration clauses."); see also *Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (1959) ("[Any] doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 421 (1967) ("Today, without expressly saying so, the Court does precisely what the Judge Medina did in *Robert Lawrence*.").

102. See *supra* Parts I & II.

reviewed and resolved, in the first place, by arbitration.

*The arbitration shall be exclusively administered by the American Arbitration Association (AAA) pursuant to its Arbitration Rules in effect at the time any party submits a claim to the AAA.*

*The AAA Arbitration Rules applicable to the claim(s) are expressly incorporated herein by reference and form a part of the arbitration agreement between the parties.*

Commentary to provisions (2) and (3):

These provisions designate the organization that will administer the arbitration and the rules that will govern, as well as incorporate the designated rules into the contract. These provisions choose the AAA as the administering body and source of the rules but, just as well, could choose a different, industry-specific source.

Parties may wish to apply rules specially adapted to commercial-marijuana disputes. Although marijuana groups have yet to propose special arbitration rules, examples of industry- and dispute-specific rules can be found in the AAA’s specially adapted rules for the resolution of construction industry, consumer, and employment disputes.<sup>103</sup>

*The parties submit and consent to the exclusive jurisdiction of the state courts in [forum City, State], to compel arbitration, to confirm an arbitration award or order, or to handle other court functions exclusively in accordance with the [forum State’s relevant Arbitration Act].*

*The parties may seek recognition and enforcement of any [forum State] state court judgment confirming an arbitration award or order in any U.S. state court or in any court outside the United States and its territories.*

Commentary to provisions (4) and (5):

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103. See, e.g., *Construction Industry Arbitration Rules and Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION, [adr.org/construction](https://perma.cc/8TX7-HWVQ) [https://perma.cc/8TX7-HWVQ]; *Consumer Arbitration Rules*, AMERICAN ARBITRATION ASSOCIATION, [adr.org/consumer](https://perma.cc/8AL4-553J) [https://perma.cc/8AL4-553J]; *Employment Arbitration Rules and Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION, [adr.org/employment](https://perma.cc/M4V2-2VVQ) [https://perma.cc/M4V2-2VVQ]. The AAA publishes more specialized rules, such as those dedicated to domain-name, healthcare, international, wireless-industry, and Olympic-sport disputes. See *AAA Court- and Time-Tested Rules and Procedures*, AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org/active-rules> [https://perma.cc/4HSJ-7VDR].



These provisions should be adopted to ensure that the prevailing party has a means of enforcing an arbitration award in a court of law. The provisions thus reinforce Section 9 of the FAA, which establishes the jurisdiction and procedure for the confirmation of an arbitration award in court.<sup>104</sup> The Supreme Court's consistent treatment of the Full Faith and Credit Clause guarantees enforcement of a valid arbitration award from one state to the next.<sup>105</sup>

*The parties expressly waive any right of removal to the United States federal courts, and the parties expressly waive any right to compel arbitration, to confirm any arbitral award, or seek any aid or assistance of any kind in the United States federal courts.*

Commentary to provision (6):

This provision precludes parties from seeking the protection of the CSA in a federal court by foreclosing defensive attempts to invoke a right of removal. Thus, this provision operates as a forum selection clause, confining the forum to the selected arbitration. By this provision, the parties functionally waive their right to remove to federal court where a judge would apply the CSA, thereby voiding the parties' underlying contract.

Practitioners have similarly suggested attorneys draft forum selection clauses requiring that marijuana-related litigation take place only in state court.<sup>106</sup> Pursuant to Section 1441(a) of Title 28 of the United States Code, a defendant may remove a case originally brought in state court to federal court in the district where the suit is pending if the claim provides original jurisdiction in federal courts.<sup>107</sup> If the defendant comes from, operates its principal place of business in, or is incorporated in a state other than that of the plaintiff, the defendant could strategically invoke removal jurisdiction as a defensive strategy.<sup>108</sup> Once in federal court, a federal judge would apply the "laws that every U.S. judge swears to uphold"<sup>109</sup> — federal law

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104. 9 U.S.C. § 9.

105. *Id.*

106. See Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 553, 595 (1993).

107. *Ibid.*

108. See 28 U.S.C. § 1332 (2017) (defining when federal courts have original diversity jurisdiction). A marijuana-related contract will not likely involve any federal questions on its face, and thus, removal will not likely be asserted on the basis of federal subject matter jurisdiction. See Brianna J. Fuller, Note, *III. Federal Question Jurisdiction*, 37 LOY. L.A. L. REV. 1443, 1466–67 (2004) ("A federal court will only have federal question jurisdiction when a substantial federal question appears on the face of the plaintiff's claim.").

109. *In re Arenas*, 535 B.R. 845, 854 (B.A.P. 10th Cir. 2015).

— leaving the plaintiff without means of redress. Practitioners can anticipate and preempt this strategy by bargaining for a forum selection clause that waives both parties’ right to remove.

Unfortunately, this drafting solution is not an absolute solution. *Hammer v. Today’s Health Care II*, in which a state court judge enforced the CSA, suggests that removing to federal court might not always be necessary to succeed defensively in a marijuana-related suit.<sup>110</sup> Whether in state or federal court, the odds remain stacked against individuals involved in commercial marijuana ventures even if such individuals operate their businesses legally, under state law.

*The laws of the state of [forum State], including the [forum State’s relevant Arbitration Act], shall apply exclusively as the laws governing this arbitration agreement between the parties, with the sole exception of the [certain forum State law provisions], which shall not apply. The parties may, however, choose a different substantive contract law or other laws to govern the main contract containing this arbitration agreement. In the event the parties have included a separate provision in their contract providing for a state, country, or international law to apply, unless otherwise expressly agreed upon, such provision shall be interpreted to import rights and obligations of the parties outside the arbitration agreement.*

Commentary to provision (7):

This choice of law provision allows parties to determine the law applicable to their contract. Parties should elect to apply laws from states with legislation legalizing recreational or medical marijuana, or both, to further avoid conflict with the CSA.

*Notwithstanding any agreement by the parties to apply a different law to the main contract containing this arbitration agreement, any principles of public policy applied by the arbitrators shall consist exclusively of the [forum State]’s relevant public policy, including those specific state statutes.*

Commentary to provision (8):

This provision precludes arbitrators from invoking public policy to render the contract void and unenforceable. Such a provision relies on

110. See *Hammer v. Today’s Health Care II*, No. CV2011-051310, 2012 WL 12874349 (Ariz. Sup. Ct. Apr. 12, 2012).

applicable state principles of public policy, such as those enacted in Colorado and Oregon, for interpretation.<sup>111</sup> For example, under Colorado state code effective May 2013, “[i]t is the public policy of the state of Colorado that a contract is not void or voidable as against public policy if it pertains to lawful activities” related to the state laws legalizing marijuana distribution and consumption.<sup>112</sup> Oregon’s legislature has adopted a similar act: “No contract shall be unenforceable on the basis that manufacturing, distributing, dispensing, possessing, or using marijuana is prohibited by federal law.”<sup>113</sup> A party that brings suit under these auspices might come across a judge willing to overlook the CSA and enforce the parties’ contract according to general contract principles.

*An arbitrator exceeds his or her powers by voiding or refusing to enforce any contracts or arbitration agreements between the parties based solely on the cannabis-related nature of the contract.*

Commentary to provision (9):

An arbitrator must strictly agree to enforce the terms of the parties’ contract. The United States Supreme Court praises arbitration for this reason, noting in particular that “[i]t can be specified . . . that the decision maker be a specialist in the relevant field.”<sup>114</sup> At least one practitioner suggests attorneys openly acknowledge the illegality of their parties’ contract in traditional forums to similarly bind judges.<sup>115</sup>

Many in the industry are wary of such tactics; should the strategy fail, the consequences are costly.<sup>116</sup> When California’s largest cannabis company CannaCraft decided to emerge from the “gray market” and “shed [its] clandestine past,” it faced a loss of \$500,000 in cash, \$3 million worth of machinery, and \$1.5 million worth of cannabis products after 100 officers and agents from the Drug Enforcement Administration raided its facilities in June of 2016.<sup>117</sup> Only a month earlier, CannaCraft had hosted nearly 50 lawmakers and regulators from Sacramento to showcase its

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111. See COLO. REV. STAT. § 13-22-601 (2013); see also Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, 2015 Or. Laws ch. 1, § 12.

112. COLO. REV. STAT. § 13-22-601 (2013).

113. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, 2015 Or. Laws ch. 1, § 12.

114. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011).

115. See Rebecca Millican, *Crafting a Marijuana Business Contract That Will Stand up in Court*, CANNA L. GRP. (Sept. 30, 2015), <http://www.cannalawblog.com/crafting-a-marijuana-business-contract-that-will-stand-up-in-court> [https://perma.cc/69GG-X7LF].

116. See Fuller, *supra* note 108.

117. *Ibid.*

compliance efforts and “change people’s image of what a cannabis company looked like.”<sup>118</sup> CannaCraft’s plight explains the industry’s reluctance to “come out into the open” and acknowledge the illegality of marijuana-related ventures to traditional adjudicators.<sup>119</sup>

*If one or more provisions of this agreement, including the arbitration clause, is for any reason held to be unenforceable or invalid, then such provisions will be deemed severable from the remaining provisions of this agreement and will in no way affect the validity or enforceability of such other provisions or the rights of the parties hereunder.*

Commentary to provision (10):

This provision is valid and enforceable pursuant to the holdings in *Prima Paint*, *Southland*, and *Buckeye*, discussed above.<sup>120</sup>

*In addition, if any provision of this agreement (or portion thereof, including the arbitration agreement) is determined by a court to be unenforceable as drafted by virtue of the duration, scope, extent, character, or legality of any obligation contained therein, the parties acknowledge that it is their intention that such provision (or portion thereof) shall be construed in a manner designed to effectuate the purposes of such provision to the maximum extent enforceable under applicable law.*

*In the event the right to arbitrate any dispute, claim, or controversy arising out of or relating to this agreement is rendered invalid or unenforceable, the dispute, claim, or controversy arising out of or relating to this agreement shall be subject to the exclusive jurisdiction of the state courts in the [forum City, State], unless otherwise agreed upon by the parties.*

Commentary to provisions (11) and (12):

These provisions reinforce the terms set forth in provision six. That is, the provisions anticipate that an agreement intended to be enforced in arbitration, once removed to federal court or subjected to federal law, might fall prey to the terms of the CSA and doctrines of illegality. Consequently, these provisions serve as a preventive measure against enforcement of the

118. *Ibid.* (quoting Dennis Hunter, a founder of CannaCraft).

119. *Ibid.*

120. *See supra* Parts I & II.

CSA in the event the dispute is removed from arbitration to the traditional court system by directing the litigation to state court.

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The combination of these key provisions offers the possibility of legal stability and regularity to parties involved in the marijuana industry. Although such protection comes in the form of enforceable contracts and industry-specific dispute resolution procedures and standards, rather than public law, the marijuana industry will still be able to achieve the legitimacy afforded to it by citizens of legalizing states. The parties, bound by these provisions, will find in arbitration the fair dispute resolution effectively denied to individuals operating in the current, politically uncertain climate.

### CONCLUSION

Although state support for the legalization of both recreational and medical marijuana has risen substantially since the passage of California's Compassionate Use Act in 1996,<sup>121</sup> the federal government remains adamant about marijuana's status under the federal Controlled Substances Act. Incoming administrations may continue to outline a program of selective enforcement for prosecutors, but members of the judicial branch are prohibited from joining in such agendas. Judges will continue to enforce the CSA, at least until Congress legislates otherwise. Thus, individuals looking to capitalize on the booming commercial marijuana industry risk being denied access to justice in the U.S. court systems. Rather than gamble on the government turning a blind eye to objectively illegal activity, marijuana industry members should contract for effective dispute resolution by the incorporation of arbitration provisions. The provisions proposed draw on the success and favorable reception of the Federal Arbitration Act. For the time being, therefore, the best way for private parties to approach the impasse between the federal and state governments is not to actually solve the impasse, but rather to resort to this favorite among forms of alternative dispute resolution to ensure the success of the marijuana industry going forward.

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121. Compassionate Use Act, CAL. HEALTH & SAF. CODE § 11362.5 (Deering 2017).